Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage	)	**WC Docket No. 18-155**
	)	
	)	
	)	

COMMENTS OF
ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to the *NPRM* seeking comment on proposals for how access-stimulating local exchange carriers (LECs), should connect to interexchange carriers (IXCs), with the goal of eliminating arbitrage in the intercarrier compensation (ICC) system.[1]

I. THE MOST EFFECTIVE SOLUTION TO ADDRESS ARBITRAGE BY ACCESS-STIMULATING LECS IS THE JOINT PROPOSAL DISCUSSED IN PARAGRAPHS 21-22 OF THE *NPRM*

The *NPRM* proposes to give access-stimulating LECs two choices about how they connect to IXCs. First, an access-stimulating LEC can opt to be financially responsible for calls delivered to its network so it, rather than IXCs, pays for the delivery of calls to its end office or the functional equivalent. Or, instead of accepting such financial responsibility, an access-stimulating LEC can elect to accept direct connections either from the IXC or an intermediate access provider of the IXC's choosing, enabling IXCs to bypass intermediate access providers that have been interposed in the call route by the access-stimulating LEC.[2] The *NPRM* also,

---

[1] *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, FCC 18-68 (June 5, 2018) (*NPRM*).

[2] *See id.* at 2, para. 3.

however, seeks comment on alternative proposals. ITTA urges the Commission to adopt the Joint proposal described in paragraphs 21-22 of the *NPRM*.[3]

As characterized by the *NPRM*, the Joint proposal recommends that the Commission adopt rules akin to the first prong of the *NPRM*'s proposal. Specifically, an access-stimulating LEC would bear the financial responsibility for all terminating interstate tandem switching and switched transport costs (including both flat-rated and usage-sensitive charges) between their end office (or remote or functional equivalent) and the tandem switch to which the terminating carrier requires inbound calls to be routed.[4]

The benefits of the Joint proposal are manifest. As the *NPRM* asserts, access stimulation is the most widespread access arbitrage scheme.[5] Furthermore, notwithstanding Commission efforts to reduce the ability of access stimulators to profit from their schemes, access-stimulating LECs have adjusted their practices by now interposing intermediate providers of switched access service not subject to the Commission's existing access stimulation rules in the call route, and sharing with such intermediate providers the increased access charges that IXCs must pay as a result.[6] By requiring the access-stimulating LECs instead to absorb *all* costs related to such schemes and their access stimulation activities as a whole, the Joint proposal should cleanly and comprehensively fulfill the Commission's aims in the *NPRM* "to eliminate financial incentives to engage in access stimulation."[7]

---

[3] *See id.* at 8-9, paras. 21-22 (citing Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, CenturyLink, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 11, 2018) (Joint proposal)).

[4] *See* Joint proposal.

[5] *See NPRM* at 2, para. 2.

[6] *See id.* ITTA notes that while the *NPRM* focuses on unnecessary access charges imposed on IXCs, there are instances where LECs also may be subject to such charges.

[7] *Id.* at para. 3.

The *NPRM* seeks comment on the Joint proposal not only on its own merits, but also specifically relative to the *NPRM*'s two-pronged approach, which would enable access stimulating LECs to escape financial responsibility by accepting directing connections.[8] Permitting access-stimulating LECs to unilaterally decide to accept direct connections in lieu of financial responsibility threatens to introduce more loopholes that could undermine the *NPRM*'s intention of thwarting incentives to engage in arbitrage,[9] just as access-stimulating LECs have managed to exploit since the Commission adopted rules aimed at reducing their ability to profit from arbitrage.[10]

To illustrate, after accepting a direct connection to one point, the terminating carrier could then designate a different point for terminating traffic. Meanwhile, the IXC (or an intermediate provider of the IXC's choice) has invested in a trunk for direct connection to the original interconnection point. When the terminating carrier designates a different point for terminating traffic, the IXC's or intermediate provider's investment is then effectively stranded. The *NPRM* recognizes this potential pitfall, seeking comment on whether, to "ensure that the investment made by an IXC to extend its network to directly interconnect with an access-stimulating LEC is not stranded," an access-stimulating LEC should be prohibited from ending its election of direct connections once made.[11]

Rather than adopting such a rule, the Commission can avoid this rigmarole simply by removing altogether the prospect of the access-stimulating LEC realizing any financial gain from such maneuvers, as the Joint proposal would preclude. At the same time, as the *NPRM* observes,

---

[8] *See id.* at 8-9, para. 22.

[9] *Id.* at 4, para. 8 ("We are mindful of the fact that practices adjust to regulatory change; therefore, we invite comment on how to avoid introducing incentives for new types of arbitrage to arise.").

[10] *See id.* at 2, para. 2.

[11] *Id.* at 8, para. 18.

the Joint proposal does not prevent an access-stimulating LEC from avoiding intermediate provider access charges by accepting direct connections.[12] In this regard, the threat of incurring intermediate provider access charges may incent access-stimulating LECs to offer more efficient network routing through direct connections.

The key distinguishing feature between the Joint proposal and the *NPRM*'s proposal is that the Joint proposal allows the IXC, rather than the access-stimulating LEC, to choose which approach it prefers. The *NPRM* suggests that the Joint proposal is disadvantageous insofar as it "does not provide IXCs any incentive to accept offers of direct connection" from access-stimulating LECs, while the *NPRM*'s proposal is advantageous by "provid[ing] a formal means by which access-stimulating LECs may eventually avoid incurring intermediate access provider charges."[13] This reasoning, however, is askew. There is no cause for the Commission to place its emphasis on the welfare of entities that have long been flouting the ICC system to seize upon arbitrage opportunities that "harm consumers, undermine broadband deployment, and distort competition"[14] – especially where, as discussed above, the choice of direct connections could lead to additional loopholes. Enterprises characterized as access-stimulating LECs under the Commission's rules have already made their choices. By their nature, such enterprises have chosen to conduct their businesses in a manner that leads to inefficiencies and artificial inflation of other carriers' costs, which are ultimately paid for by these other carriers' customers. "Since the access stimulating carriers have made this choice, it would be appropriate for them, not other

[12] *See id.* at 8, para. 22.

[13] *Id.*

[14] *Id.* at 1, para. 1.

carriers, to bear the financial responsibility"[15] – as well as the risks – associated with their gambits.

The *NPRM* also seeks comment on whether, and if so, how, to revise the Commission's current definition of access stimulation to more accurately and effectively target harmful access stimulation practices.[16] ITTA believes that the Commission's current definition of access stimulation works sufficiently well.[17] The arbitrage that the *NPRM* endeavors to inhibit is less a matter of how an access-stimulating LEC is defined than it is a by-product of those defined as access-stimulating LECs exploiting gray areas in the Commission's rules to improperly extract access charges. In that regard, it is unclear that trying to bring greater precision to the ratios or triggers in the definition would yield any benefit, while it would potentially delay Commission action critically needed to address access arbitrage,[18] as well as potentially sweep in carriers that do not artificially stimulate traffic.[19] Therefore, ITTA believes the Commission would be wise

---

[15] Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 16-363, at 1 (filed Nov. 16, 2017).

[16] *See NPRM* at 10, para. 26.

[17] *See id.* at 3, paras. 4-5 (describing current access stimulation rules).

[18] When the Commission adopted rules in the *USF/ICC Transformation Order* to address access stimulation, it "confirm[ed] the need for prompt Commission action to address the adverse effects of access stimulation." *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17875, para. 662 (2011) (*USF/ICC Transformation Order*), *aff'd sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015). Nearly seven years later, with access arbitrage schemes again flourishing, *see NPRM* at 2, para. 1, the need for prompt Commission action is equal, if not greater.

[19] Relatedly, as part of its overall endorsement of the Joint proposal, ITTA also supports the Joint proposal's safeguard designed to ensure that LECs which are not access stimulators do not get ensnared within the reach of the access stimulator financial responsibility rule. *See, e.g.*, Joint proposal, Proposed Rules, new Section 61.26(g)(3) ("Notwithstanding the foregoing, any carrier that is not itself engaged in access stimulation, as that term is defined in §61.3(bbb), but is involved in jointly provided switched access services with an access stimulation CLEC, shall not itself be deemed an access stimulator or be impacted by this rule beyond a requirement to make any necessary changes to bill its interstate terminating tandem switching and terminating

(continued…)

to implement measures to combat access arbitrage without being distracted by a detour attempting to refine a definition that works reasonably well as is.

II. IN ORDER TO ADDRESS THE ARBITRAGE SCHEME DEPICTED IN PARAGRAPH 30 OF THE *FNPRM*, THE COMMISSION SHOULD APPLY THE CENTURYLINK PROPOSAL TO CMRS PROVIDERS

In addition to endeavoring to combat access stimulation, the Commission seeks comment on addressing other arbitrage schemes. One such scheme involves a revenue sharing or other type of agreement between an intermediate access provider and a Commercial Mobile Radio Service (CMRS) carrier, whereby CMRS carriers that previously offered direct connections between their networks and the IXCs' networks now use intermediate access providers to terminate their traffic from IXCs, and both parties to the agreement reap the benefits of the unnecessary tandem terminating access and transport charges that the IXCs consequently cannot avoid.[20] In order to address this scheme, ITTA urges the Commission to apply the CenturyLink proposal[21] to CMRS providers, which are not subject to the Commission's access stimulation rules.[22]

In so doing, the Commission would require CMRS providers to offer other carriers an opportunity to interconnect directly with no additional charges for all terminating switched access traffic. If the CMRS provider declines a request to connect directly with no additional charge, and instead designates one or more points of indirect interconnection, then that CMRS provider and not the carrier requesting direct interconnection would be financially responsible for any intermediate

(Continued from previous page)
switched transport access charges to the access stimulating CLEC for traffic terminating to such access stimulating CLEC's end users.").

[20] *See NPRM* at 11, para. 30.

[21] Letter from Timothy M. Boucher, Associate General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155 et al., at 3 (filed May 21, 2018) (CenturyLink *Ex Parte*); *See NPRM* at 9, para. 23 (seeking comment on CenturyLink proposal).

[22] ITTA has previously advocated that the Commission address such arbitrage by certain CMRS providers. *See* ITTA Comments, WC Docket No. 10-90, CC Docket No. 01-92, at 7-9 (Oct. 26, 2017) (ITTA Oct. 26, 2017 Comments).

services necessary to receive traffic from such a point of indirect interconnection (including, e.g., tandem switching and tandem switched transport provided by an affiliated or third party intermediate carrier).[23] In this case, restoring the efficiency of direct connections to these routes, with a CMRS carrier's financial responsibility to completely cover the costs related to the termination of traffic from a point of indirect interconnection caused by the CMRS carrier as a critical backstop, would ensure that the Commission's arbitrage inhibition aims are realized.

The Commission possesses authority to apply CenturyLink's proposed solution to CMRS carriers under Sections 251(a) and 201(b) of the Communications Act of 1934, as amended (Act).[24] Section 251(a)(1) of the Act provides that "[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

In the immediate aftermath of enactment of the Telecommunications Act of 1996, the Commission interpreted Section 251(a) as permitting carriers to provide interconnection either directly or indirectly, "based upon their most efficient technical and economic choices."[25] Distinguishing Section 251(a) from 251(c), the latter of which applies exclusively to incumbent

---

[23] *See* CenturyLink *Ex Parte* at 3. Under the rural transport rule, 47 CFR § 51.709(c), CMRS carriers already are required to cover some interconnection costs with rural, rate-of-return LECs, regardless of whether interconnection is direct or indirect. Section 51.709(c) provides that, for non-access traffic, the rural rate-of-return LEC is responsible for transport to the CMRS provider's chosen interconnection point *when it is located within the LEC's service area*. When it is located outside the LEC's service area, the rule provides that the LEC's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. Because, when adopted, Section 51.709(c) was cast as an interim rule, ITTA has advocated that the Commission codify it as permanent. *See* ITTA Oct. 26, 2017 Comments at 4-5.

[24] 47 U.S.C. §§ 201(b), 251(a). *See* CenturyLink *Ex Parte* at 5-6; *NPRM* at 13, para. 36 (asserting the Commission's authority to address access arbitrage pursuant to Section 201(b), and seeking comment on whether additional statutory authority is available to support the actions on which it seeks comment).

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15969, para. 997 (1996).

LECs, the Commission also found that indirect interconnection satisfies a carrier's duty to interconnect pursuant to Section 251(a) "[g]iven the lack of market power by telecommunication carriers required to provide interconnection via section 251(a)."[26] Over two decades later, with dramatically different market conditions, the time is ripe for the Commission to revisit these findings. For one thing, in the scenario described above, the most efficient technical and economic choice is for the CMRS carrier to permit the IXC to terminate traffic directly to its network via direct interconnection. In addition, it is no longer credible to suggest that a CMRS carrier suffers a market power deficit relative to an IXC or LEC.[27] Moreover, the very nature of the scheme, which relies on the existence of competitive transport providers to carry the traffic from the third-party tandem to the CMRS carrier's network, demonstrates the IXC's lack of market power with respect to such transport routes.

The refusal by some CMRS carriers to directly interconnect, leading to wasteful inflation of transport costs, also presents an exemplary case of an unjust and unreasonable practice under Section 201 of the Act. It creates competitive market distortions between wireline and wireless services, an outcome that the Commission's ICC reforms were precisely designed to eliminate.[28]

---

[26] *Id.*

[27] In December 2016, there were 341 million mobile subscriptions in the United States, as compared to only 121 million wireline retail voice telephone service connections (including both switched access lines and interconnected VoIP subscriptions). *See* FCC, Voice Telephone Services: Status as of December 31, 2016 at 2 (WCB 2018), https://docs.fcc.gov/public/attachments/DOC-349075A1.pdf. If trends continue in their recent trajectory, *see id.* at Fig. 1, the next Voice Telephone Services Report will show another increase in that disparity.

[28] *See, e.g., USF/ICC Transformation Order*, 26 FCC Rcd at 17676, para. 34.

In sum, a requirement that CMRS providers offer direct connections not only is supported by Sections 201 and 251(a), it also is a critical component of an effective solution to address the depicted CMRS carrier arbitrage scheme.[29]

III. CONCLUSION

The time to eradicate access arbitrage once and for all is now. The Joint proposal presents a clear and comprehensive path to eliminate financial incentives to engage in access stimulation, and avoids mischief that could be wrought by access-stimulating LECs via enabling them to choose direct connections. A direct connection requirement, however, supported by a fallback of financial responsibility to terminate traffic, is an effective antidote to arbitrage schemes executed by CMRS providers not subject to the Commission's access stimulation rules. ITTA urges the Commission to adopt these measures.

Respectfully submitted,

By: /s/ Genevieve Morelli

Genevieve Morelli
Michael J. Jacobs
ITTA
1101 Vermont Ave., NW, Suite 501
Washington, DC 20005
(202) 898-1520
gmorelli@itta.us
mjacobs@itta.us

July 20, 2018

[29] *See* CenturyLink *Ex Parte* at 6 ("just as CMRS providers in the late 1990's contended that they should be free to choose the most efficient manner of interconnection with ILECs, so too IXCs should be free to do so as well, or at least avoid the additional costs of indirect interconnection when that is the only method a terminating carrier will permit").